Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, 1907.

JOSEFA DIANA MARTINEZ, JULIO N. CHARDON, CARLOS CABRERA and TOMAS TORRES,
Appellants,

vs.

LA ASOCIACION DE SEÑORAS DAMAS DEL SANTO ASILO DE PÓNCE,
Appellee.

No. 312.

Appeal from the District Court of the United States for Porto Rico.

Brief on Behalf of Appellants.

Statement.

This is an appeal from a final decree of the United States District Court for the District of Porto Rico.

On July 7th, 1905, the complainant below (the appellee here) filed, in the United States District Court for Porto Rico, a bill against Josefa Diana Martinez, Julio N. Chardon, Carlos Cabrera and

Tomas Torres, in which bill the following allegations were made (Rec. p. 1).

That on the 17th day of December, 1873, one Juan Bautista Silva made his last will and testament by which he constituted one Juan Apolinario Laboy his sole heir of the properties described in the complaint, on condition that one-half of the net income of said properties should be delivered to the Santo Asilo de Caridad de las Damas de Pónce, a charitable institution, each year, after satisfying municipal and other taxes which should be legally imposed, and with the further condition that the said Juan Apolinario Laboy shall appoint a person who should be named in his last will and testament with the same powers and for the same object, and that this power of substitution given by the testator to the said Laboy should be transmitted successively by each person so named, to discharge said trust; and it was further provided in said will that if, on any account, the said inheritance should become vacant, that in such case, at the death of the said Juan Apolinario Laboy, the whole estate shall pass to the said Santo Asilo de Caridad de las Damas de Pónce.

The bill further alleges that the said Juan Bautista Silva died on the 15th day of May, 1875. That then the said Juan Apolinario Laboy entered into possession of the properties described. That said Laboy carried out the provisions of the will and continued, during his lifetime, to administer the properties according to the said provisions.

That on the 30th day of September, 1875, the said Laboy made and executed his last will and testament, wherein he named his wife, Dominga Fernandez y Verdes as the heir of the said Silva estate in substitution for himself, or, in case of

her death before his, or other legal impossibility, he also named in her stead his foster-son, Jose Laboy, as such heir of the estate of the said Silva, thereby conferring upon said substituted heir the same ample powers which said Silva had conceded to him by his last will and testament hereinbefore referred to.

The bill further alleges that upon the death of the said Juan Apolinario Laboy the said Dominga Fernandez y Verdes, his widow, the person named in his will as his substitute, entered upon the possession of the said estate and continued to possess said estate until the 15th day of January, 1891, on which date she died, but that she had failed to comply with the Silva will requiring her to execute a testament naming the person who should succeed her in the performance of the duties specified in the said Silva will, and that she died intestate.

The bill further alleges that the said Jose Fernandez Laboy, who was named by Juan Apolinario Laboy as his second substitute, took, at the death of the said Dominga Fernandez y Verdes, possession of the said estate, and that he also executed, on the 4th day of October, 1893, a public document, called "a substitution of heirship," wherein he named his legitimate wife, Josefa Diana y Martinez, one of the defendants, as his substitute, and that he also, on the 11th day of November, 1903, executed his last will and testament, whereby he ratified the said substitution of heirship conferred upon the said Josefa Diana y Martinez, one of the defendants.

The bill further alleges that upon the death of the said Jose Fernandez Laboy, the defendant, Josefa Diana y Martinez, acting under the said document, entered upon the control and manage-

ment of the said estate and has continued in possession and control of the same up to the present time, and that she has refused to recognize the rights of the complainant to any extent whatever, and that she, moreover, attempted to execute leases of portions of said estate for long terms of years for inadequate rentals. That she has fraudulently obtained a possessory title to nearly all of the said estate, and that she also made efforts to obtain a dominion title thereof, but was interfered with in that respect by the complainant.

The bill further alleges that many long term leases have been made and executed several times by the defendant, Josefa Diana Martinez to the other defendants, and that said leases were made for inadequate rentals and with a fraudulent intent.

The prayer of said bill is to the effect that the complainant be decreed to be the owner of the full title and dominion to the said estate and that the defendant, Josefa Diana Martinez be decreed to turn over and deliver up the possession and control of all the property of said estate to the complainant. That all the leases described in the will be declared null and void and ordered cancelled, and for many other matters stated in said bill.

To the said bill of complaint there was first filed by the defendants a demurrer, (Rec. p. 18), alleging:

(1) Want of jurisdiction of the Court;

(2) Want of a cause of action entitling the plaintiff to the relief prayed; and

(3) That the complainant's right is barred by the statute of limitations.

The Court overruled the demurrer (Rec. p. 19).

Thereupon the defendants filed a plea (Rec. p. 20) in which they set up that Dominga Fernandez Verdes, on April 24th, 1869, named as her universal heir her adopted son Jose Laboy Fernandez, and that, at the time of her death, she was the sole owner of the said estate, because she being the second substituted heir of the estate left by Juan Bautista Silva, the substitution instituted by the said Silva had no further effect, according to the law, excepting always the provision reserving the right to the complainant of one-half of the net profits.

This plea was overruled by the Court (Rec. p. 21).

Then the defendants filed an answer to the bill (Rec. p. 22) in which they alleged that by the last will and testament of Dominga Fernandez Verdes, executed on the 24th of April, 1869, she instituted Jose Laboy Fernandez as her universal heir of all her property, including the estate of Juan Bautista Silva, an estate affected by a right of usufructus trust obligation in favor of the complainant for one-half of the net income.

That the condition in the will of the said Silva whereby a successor ought to be perpetually named, was null and void under the laws existing at the time of the will made by Silva or at the time of his death, said laws forbidding perpetuities of any kind. That the condition of the will of the said Silva was, besides, only that, in case of failure of the first heir, Juan Apolinario Laboy to appoint his successor, at his death solely, the estate should go to the complainant, and that, therefore, he having complied with said will, this condition could no more apply.

That, therefore, at the death of the said Dominga Fernandez Verdes, her universal heir, Jose Laboy Fernandez became the owner of the said estate alike with the other properties left by her.

The answer further alleges that the defendant, Josefa Diana Martinez has never refused to pay the complainant one-half of the net profits according to the trust imposed by the will, and that the complainant having accepted from Jose Laboy Fernandez and from Josefa Diana Martinez one-half of the net profits aforesaid, has consented to the right of control and possession of the estate of Silva by the defendant, and is estopped from denying it now.

The answer further alleges that the leases referred to in the bill of complaint were made in good faith and for rentals adequate at the time of the making of the said leases and that they were made with the knowledge of the complainant, and that therefore the complainant is estopped from any claim made against them now.

The answer further alleges that the defendant, Josefa Diana Martinez, obtained a possessory title and also tried to obtain a dominion title in a local court having jurisdiction, but was stopped by the complainant's objection, and in which proceeding no final decree was entered, neither could be entered, it being an ex-parte proceeding only.

The answer further alleges that the complainant is a corporation organized and existing under the laws of Porto Rico, and that all the defendants are citizens of Porto Rico.

Finally the answer alleges that the cause of action is barred by the statute of limitation, the defendant and predecessor in title having been in possesion of said property during more than ten years

before the commencement of this suit, without any interruption, in good faith and by a just title.

The issues having been joined by a replication to the answer, a hearing was had by the Court and a decision and decree made in favor of the complainant and against the defendants.

The statement of facts by the Court is to be found in the Record at page 49. The opinion of the Court on page 29, and the final decree on page 41.

A petition on appeal was then filed, together with an assignment of errors (Rec. p. 45), and the appeal was perfected by a supersedeas bond.

Assignment of Errors Relied Upon On This Appeal.

(1). That the Court erred in holding the intention of Juan Bautista Silva to be that Juan Apolinario Laboy shall only be trustee and not his heir of the said estate, subject only to the right of usufruct by the complainant. (Nos. 3, 4, 8 and 10 of the Assignment of Errors.)

(2). That the Court erred in not holding that the condition of perpetual substitution in the Silva will was null and void under the law at that time, prohibiting perpetuities. (Nos. 5 and 6 of the Assignment of Errors.)

(3). That the Court erred in not holding that the third clause or condition of the said Silva will could only have reference to the time of the death of Juan Apolinario Laboy and not beyond that. (No. 9 of the Assignment of Errors.)

(4). That the Court erred in giving the Silva will a construction which is not in accordance with

the geenral rule of interpretation of wills, whereby when the language of the will is free from doubt and the intention of the testator is plain and intelligibly expressed, there is no need of interpretation. (No. 7 of the Assignment of Errors.)

(5). That the Court erred in holding that the deficiency of consideration by itself is evidence enough to render a contract void and to imply fraud. (No. 11 of the Assignment of Errors.)

(6). That the Court erred in holding that the complainant was not estopped. (No. 12 of the Assignment of Errors.)

(7). That the Court erred in holding that the cause of action was not barred by the statute of limitations. (Nos. 13, 14, 15 and 16 of the Assignment of Errors.)

(8). That the Court erred in not dismissing the case (for want of jurisdiction). (No. 2 of Assignment of Errors.)

POINTS.

1. This Court has jurisdiction on appeal.

2. The Court below had no jurisdiction to try the cause.

3. It is the general rule of the Spanish law, as well as of the American law, that wills have to be construed exactly as they read, unless such construction be a ridiculous one or an evidently incorrect one. That therefore the words "sole and only voluntary heir" mean what they say, the same as the words: "at the death of Apolinario Laboy."

4. The law at the time of the death as well as of the date of the will of Silva, prohibits any condition in a will by which the alienation of the estate is interfered with and a perpetuity is intended to be established. Under said law the will is valid in its totality excepting such void condition.

5. That the cause of action is barred by the statute of limitations, notwithstanding the payment of one-half of the profits to the complainant by the defendant.

6. That the complainant is estopped by its own action from setting up any claim to the ownership of the estate or against the validity of the leases.

7. Inadequacy of the price paid is not by itself sufficient proof of fraud in the transaction.

POINT I.

This Court has jurisdiction on appeal.

In Royal Insurance Company vs. Martin, 192 U. S., 149, 161, it was held that this Court has jurisdiction in appeals and writs of error coming from Porto Rico "in every case, without regard to the sum or value in dispute, where the Constitution of the United States or a treaty thereof or an act of Congress is brought in question and the right claimed thereunder is denied, *and in every other case where the sum or value in dispute exceeds* $5,000, *exclusive of costs.*"

As the amount involved is over $10,000 (Rec. p. 11, folio 20), the jurisdiction of this Court is clear.

POINT II.

The Court below had no jurisdiction to try the cause.

The United States Court for Porto Rico has jurisdiction in cases where no Constitutional or Federal statutory questions are involved only where one of the parties, either defendant or complainant, is a foreign subject or a citizen of the United States.

In the case at bar, all the defendants are citizens of Porto Rico. The complainant is a corporation organized by a Royal Decree of the Spanish Crown, of November 11th, 1863, that is to say, at the time Porto Rico was a province of Spain, having its residence at Ponce, in the Island of Porto Rico. (Rec. p. 29, folio 54.)

Now we claim that under those circumstances the complainant is not a foreign subject, but is a citizen of Porto Rico.

A natural person born in Porto Rico at the time when Porto Rico was a province of the Kingdom of Spain, will not become a foreigner in Porto Rico after it has been organized as a territory or a people under the Government of the United States or any other government, unless he expressly renounces the citizenship of Porto Rico and becomes a citizen of another country, or unless there is a special provision created, either by treaty between the two governments, that is to say, between the government ceding and the government acquiring the territory, or by a law made in that behalf by the new government acquiring the territory.

The same principle must apply to an artificial person, that is to say, to a corporation organized by law. A corporation organized in Porto Rico under the Spanish Government while Porto Rico was a province of Spain, did not become a foreign

corporation when Porto Rico was ceded by Spain to the United States, and after Porto Rico was organized as a territory or a people, in case such corporation continues to reside and do business in Porto Rico and does not expatriate itself by asking for a new charter from a foreign government.

The Foraker law, that is to say, the Organic Act of Porto Rico called "An Act Temporarily to Provide Revenues in the Civil Government for Porto Rico and for other purposes," enacted on April 12th, 1900, in Section 7, provides: "That all inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the 11th day of April, 1900, in acordance with the provisions of the treaty of peace between the United States and Spain, entered into on the 11th day of April, 1899."

In Section 8, it provides: "That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally applicable, or provisions thereof, until altered, amended or repealed by the Legislative authority hereinafter provided for Porto Rico, or by Act of Congress of the United States."

Now, the laws under which the corporation has been organized remaining in full force and effect, and the organic act providing that in order to be

exempt from citizenship of Porto Rico there must be done a certain act showing the election of an allegiance to the former government, we claim that a corporation continuing to do business in Porto Rico and to reside therein, organized under the laws governing in Porto Rico formerly, and continuing therein under the new government, becomes a corporation with citizenship in Porto Rico.

The complainant in the case at bar is just in that position, and, therefore, we claim that the complainant and all the defendants being citizens of Porto Rico, the United States District Court for Porto Rico had no jurisdiction over them or to try the case below.

This Court has repeatedly held that when the Court below had no jurisdiction, this Court, even by its own motion, will reverse the decree below. In the case at bar the demurrer set out want of jurisdiction by the Court below, but was overruled.

POINT III.

It is the general rule of the Spanish law, as well as of the American law, that wills have to be construed exactly as they read, unless such construction be a ridiculous one or an evidently incorrect one. That therefore the words, "Sole and only voluntary heir" mean what they say, the same as the words, "At the death of Apolinario Laboy."

Law 5, Title 33, Partida 7 of the Laws of Las Siete Partidas in force when the will was made, provides as follows:

"The words of the maker of the testament must be taken plainly as they sound and the Judge should not deviate from their meaning, except only when it appears with certainty that the wish of the testator was a different one from what the sound of the words is there written."

This law has been re-enacted in the Civil Code, Article 675: "Every testamentary provision shall be understood in the literal meaning of its words, unless it clearly appears that the will of the testator was different. In case of doubt, that which appears more in accordance with the intention of the testator, according to the tenor of the same will, shall be observed."

The law has been construed in a number of decisions of the Supreme Court of Spain, sitting at Madrid, reported in the volume of Reports, called "Jurisprudencia Civil."

The Supreme Court of Spain in the Sentence of March 13th, 1884, vol. 54, page 450, says literally:

"That, as it has been repeatedly declared by the Supreme Court, there is no place for interpretation of the clauses of a will when they are clear and precise, and the context must be literally followed."

Sentence of December 20, 1862, Vol. 7, No. 315, p. 787:

> "Syllabus 4: When the testament is so explicit and definite that it does not offer the slightest doubt, we cannot apply Law 5, Title 33, Partida 7, which provides how we must construe the words of the testator when his dispositions savor of confusion and ambiguity."

Sentence of December 11, 1865, Vol 12, No. 439, p. 461:

"Syllabus 9: When there is no doubt about the meaning of the words of a contract or of a will, there is no necessity of interpretation; therefore we may not apply to the same the rule of interpretation that the words of a contract or will must be construed in such a manner as to make it effective."

Decision of June 21, 1872, Vol. 26, No. 204, pp. 15-16:

"Syllabus 1: Held, that Law 5, Title 33, Partida 7, provides that the words of wills must be understood just as they sound, unless it should appear with certainty that the wish of the testator is otherwise, that his wish is not as the words in which it is expressed, and that his wish would not be disregarded by a decision which holds strictly to his dispositions."

Sentence of March 3, 1873, No. 108, Vol. 27, pp. 395-6:

"Syllabus 1: That the clauses of wills should be understood strictly according to the proper meaning of the words when it does not appear with certainty from them that the wish of the testator is different."

See also Sentence of December 31, 1872, Vol. 27, p. 166, Syllabus 1; and

Sentence of January 24, 1876, Vol. 33, No. 49, p. 191.

See also Pothier, Traite des Donations Testamentaries, Paris, 1890, edited by Bugnet, p. 330, Chap. VII, Sec. 1:

"356. Rule 1: The last wills are susceptible of broad interpretation, and one ought chiefly to try to discover what was the desire of the testator."

"357. Rule 2: One must, nevertheless, not depart from the proper meaning of the terms of the will, unless there are good reasons to believe that the testator understood them in a sense other than their natural one."

The same provisions are found in our law of the construction of wills. The plain meaning of the words used in a will is always presumed to be their meaning, and the burden of proof that they are used in another sense is upon the party claiming so.

See Aspden's Estate, F. C., No. 589.
Daley v. James, 8 Wheaton, 534.
Osborne v. Shrieve, 3 Mason, 391.

It is also invariably so held in the States where the civil law similar to that of Porto Rico is in force, as, for example, in Louisiana and California.

Norris v. Hensley, 24 Cal., 449, 450.
Sharpe v. Kleinberter, 7 La., Ann., 264.

In construing a will, the words are to be construed according to their natural import, unless the context evidently points out that in the particular instance there should be some other construction.

Sheriff v. Brown, 5 Mackey, 172.
In re Hallet, 8 Paige, 378.
Puryear v. Edmondson, 4 Heisk, 51.

A testator must be presumed to have used words in their ordinary primary sense or meaning.

In re Woodward, 117, N. Y., 522.

All doubts are to be resolved in favor of the testator's having said exactly what he meant.

Cady v. Bunn, 46 N. J. Eq..131.

Where the provisions of the will are clear and simple, no reason exists for taking the testator's words in any other than their natural sense.

Wiley v. Lockwood, 86 N. Y., 301.
Lovett v. Buloid, 3 Barb. Ch., 137.

The question is expounding a will is, not what the testator meant, but what is the meaning of the words used by him.

Barrows App. (Pa.) 8 Cent. Rep., 132.
Bates vs. Woodruff, 123 Ill., 205.

Only when technical words are employed in a will in such a manner that to give them their strict meaning would defeat the intention of the testator, apparent from the will, a more liberal or popular interpretation will be given to them in order to carry such intention into effect.

De Kay v. Irving, 5 Denio, 646.

Now the Silva will expressly says: "I name and constitute him (Juan Apolinario Laboy) as my sole and only voluntary heir to said estate." It cannot, therefore, be claimed that he meant him only to be a trustee of the whole estate, and not an heir to it, especially as such a construction, meaning him to be an heir, does not stand in conflict with the rest of the provisions of the will and with the intention of the testator, that one-half of the profits shall go for the benefit of the Santo Asilo de Caridad de las Damas de Pónce.

Moreover, this is the only reasonable construction that can be given, because, if the testator wanted the Santo Asilo de las Damas to be his sole heir, there was not the least impediment, either in law or in fact, preventing him from doing so and expressing this his intention in his last will and testament, as the said Santo Asilo de las Damas was an institution which, under the law, could receive any bequest of any kind of estate, and could be made the subject of any kind of will and testament, without any restrictions whatsoever.

If he then, under these circumstances, chose to name as his sole heir Juan Apolinario Laboy, with the condition only that the Santo Asilo de las Damas should be a beneficiary of one-half of the profits, then this was the testator's intention and nothing else.

The same reason may apply to the words "at the death of Laboy." At the time when the will was made there was in existence a law prohibiting perpetuities. The testator, Silva, must have been advised of the existence of that law by the notary who drew his will, as notaries, under the Civil Law, are obliged to explain the law of the subject to their clients.

He then must have known that a condition which would provide for the reversion of the estate to the Santo Asilo de las Damas at the time of the death of any successive heir of Juan Apolinario Laboy, would create such a perpetuity which the law does not permit.

The testator, therefore, limited the reversion of the estate to the Santo Asilo de las Damas to one period or to one generation only, this not being prohibited by the law; that is to say, to the contingency of the death of Juan Apolinario Laboy without naming a substitute for him.

It is, therefore, clear that the words "at the death of Laboy" cannot be construed to mean "at the death of any of his successors;" first, because that would be contrary to the law and no illegal intention can be imputed to a testator without necessity; and, second, because that would be against the rule of the law which does not permit the changing of the meaning of clear and precise words in a testament and giving them a new interpretation not meant or intended by the testator.

From our reasoning we deduct that the testator Silva intended to make Juan Apolinario Laboy his real heir of his estate and not a trustee only, and that the trust was only limited to the one-half of the net profits of said estate to be delivered to the Santo Asilo de las Damas.

We also deduct from the foregoing that the testator had intended that the whole estate left by him shall revert to the Santo Asilo de las Damas in case Juan Apolinario shall not comply with a condition to name a substitute for himself and shall revert only at his—that is to say—Juan Apolinario Laboy's death, and at no other time and at no other contingency.

Juan Apolinario Laboy having complied with the said condition and having named a substitute for himself at his death, there did not arise the contingency which was contemplated in the Last Will and Testament of Silva, and, therefore, at that time, that is to say, at the death of Juan Apolinario Laboy, the reversion of the estate of Silva to the Santo Asilo de las Damas did not take place, as the contingency did not arise; and at no other time could it take place, as there is or was no provision in the will for any other contingency which would give the reversion of the estate to the Santo Asilo de las Damas.

POINT IV.

The law at the time of the death as well as of the date of the will of Silva prohibits any condition in a will by which the alienation of the estate is interfered with and a perpetuity is intended to be established. Under said law the will is valid in its totality, excepting such void condition.

(*a*) It is clear from the context of the will that the intention of the testator was to provide a trust or fideicomiso of one-half of the net profits of his estate for the benefit of the Santo Asilo de las Damas.

Del Viso, one of the standard law authors of Spain, in his well-known book, "Lecciones Elementarias de Derecho Civil Mercantil y Penal de España," gives a very clear definition of the word "fideicomiso." He says (Vol. 2, p. 397):

> "A fideicomisary substitution is that in which the testator charges the instituted heir with the restriction of the estate to another. * * * In order that we may clearly explain the doctrine of jurisprudence in this class of substitutions, we will designate by their proper names the persons who intervene in them, namely:
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> "Fideicomitente"—the testator, who is the one who establishes it; "fiduciario"—the person which is instituted as heir with the charge of delivering the estate to another; "fideicomisario"—that person to which the estate must be delivered; and "fideicomiso" we name the estate which is left to a person, by or through

the intervention of another person or by an indirect method."

Among the different kinds of fideicomiso, there is one which we may designate by the name "fideicomiso perpetuo," with a prohibition to alienate the estate, and this prohibition may be either expressed or implied.

Says the Supreme Court of Spain, in the Sentence of November 23rd, 1883, Vol. 53, page 233:

> "The clause in a testament in Cataluña by which a testator has instituted as universal heirs of his estate, his son, and on his death, successively, his descendants down to the fourth generation, reveals clearly the object of the testator to institute a familiar fideicomiso, the circumstance that he does not expressly prohibit the alienation of the estate not impeding us to consider such a fideicomiso institution as established, as well because in the special legislation of Cataluña there is no rule which exacts that such a prohibition must be explicitly stated, as because, without a necessary indispensable obligation to conserve the estate, the will of the testator—that in case of the death of his son the estate passed to his grandsons in the other in which he named them, down to the fourth generation—could not be complied with."

See also Sentence of the Supreme Court of Spain of the 12th of June, 1886, Vol. 60, page 105.

Section 14 of the Law of October 11th, 1820 (repealed on the 11th day of March, 1824, but reenacted on the 30th day of August, 1836), provides as follows:

> "No person shall, from now on, even in the way of betterment or under any other title or pretext, institute 'mayorazgos,' 'fideicomisos,' patronages, chaplainships, 'obra pia,' neither any vinculation of any class of property or property rights, neither prohibit, directly or indirectly, their alienation."

The law of October 11th, 1820, can be found in Alcubilla's Dictionary of Law and Legislation, Vol. 7, page 1004.

The Royal Order of March 11th, 1824, repealing the same, may be found in Alcubilla, Vol. 7, page 1006.

The Royal Decree of August 30th, 1836, which re-establishes the law of 1820 prohibiting fideicomisos, may be found in Alcubilla, Vol. 7, page 1006.

The prohibition of prevention of alienation or perpetuities in wills and testaments is still in effect in Porto Rico, as may be seen from the Civil Code, Section 769, which provides as follows:

> "Substitutions in trust, by virtue of which the heir is entrusted with preserving and transmitting to a third person the whole or part of the inheritance, shall be valid and effective, provided they do not go beyond the second degree, or that they are made in favor of persons living at the time of the death of the testator."

Section 773:

> "The following shall produce no effect:
>
> (1). Substitutions in trust not made in an express manner, either by giving them this

name or by imposing upon the sustitute the absolute obligation of delivering the property to a second heir.

(2). Provisions containing perpetual prohibitions to alienate, and even a temporary one, not within the limits fixed in Section 769.

(3). Those imposing upon the heir the charge of paying a certain income or pension to several persons successively beyond the second degree.

(4). Those, the object of which is to leave the person the whole or part of the inheritance, in order that he may apply or invest it according to secret instructions given him by the testator."

According to the terms of the will of Silva the heir appointed by him, Juan Apolinario Laboy, was bound to preserve the estate intact and to transfer it at his death to a substitute or second heir; this second heir was bound, under the will, to preserve the estate intact and to transfer it at his death to his substitute or a third heir, etc., *ad infinitum*.

According to the terms of the said will the heir, Juan Apolinario Laboy, was prohibited from disposing of the estate by any act *inter-vivos*, as sale or gift, or any kind of donation; he was bound to transmit it only by will to his substitute or heir, preserving the whole estate without any division or diminution.

According to the terms of the will the second heir was under the same obligations not to divide or diminish the estate by any act *inter-vivos*, sale or gift, or donation, but was obliged to transmit

it only by will to his substitute or heir, preserving the whole estate without any division or diminution, in his turn.

The third substitute or heir was bound by the same conditions, and so was the fourth, and the fifth, and all future heirs, *ad infinitum*. None of them could alienate, by sale or gift or in any way, the said estate.

It is therefore clear that by the said will Silva tried to establish a fideicomiso perpetuo, and therefore the clause of the will establishing such is and was void under the law of 1820 above quoted.

Here we have to point out an error of the court below in misunderstanding the defendant's contention about the extent and meaning of the law prohibiting perpetuities.

We never intended to claim, and never did claim, that the complainant herein, Santo Asilo de las Damas, was prohibited from receiving any charitable or any kind of bequest under the law of perpetuities and mortmains. Under the Spanish law by us quoted there is no such prohibition to bequeath any estate to a charitable institution, unless the will should prohibit any further alienation, which clause, by the way, would be void in a will instituting any person as heir and not only a charitable institution.

It is not the fact that this complainant is a charitable institution that we ever pointed out as a defense in the case at bar. The complainant is perfectly able to take any bequest or legacy or devise under the laws of Spain, and we never attacked that right of the complainant. What we claim is that the complainant never became an heir of the Silva estate: first, for the reason that the clause of the said will establishing a fideicomiso perpetuo is

void; and, second, because even if it would not have been void, the reversion of the estate to the complainant could only take place at one certain time, or period, or contingency, and that is, at the death of Juan Apolinario Laboy, the first heir, without providing a substitute; but, as he did provide a substitute, the reversion did not take place, and at any time after that it could not take place, because there was no provision for it in the will. But we always admitted that if not for the void clause of the will, and if the complainant would have been instituted by the will as an heir, and not solely as a beneficiary of one-half of the profits, it would have been able, under the law, to receive the estate.

Therefore the Roca case, decided by the Supreme Court of Spain, quoted in the opinion of the judge below, does not at all apply to our argument and to our defense. Neither do the other cases, on page 830 of Alcubilla, mentioned in the said opinion of the judge below, apply to our argument and defense. Neither do the American cases cited in that opinion apply. All these cases refer to the capacity of a charitable institution to receive a bequest or legacy or devise, which right we never disputed.

The facts set forth in the Spanish decision of the above quoted Roca case are the following:

Juan Antonia Roca instituted in his will as his heir a charitable corporation of Badalona. The relatives of said Roca brought an action to set aside the will on the ground that a mortmain, after the laws against perpetuities were enacted, was incapable of acquiring by will.

The facts in the case at bar are totally different. In the case at bar the illegality does not consist in naming a charitable institution as heir or legatee, but it does consist in making obligatory upon the successive heirs to name successors *ad infinitum*

without being permitted to alienate the estate during their lifetime or to leave it ab-intestate to their heirs.

It seems to us that the court below did not pay any attention to our argument pointing out where the illegality of the will consists and mistakenly took it to consist in the fact that a beneficiary is a charitable institution.

The illegality of the clause in the will we claim to consist not in this, which is perfectly legal, but in the fact that there was a prohibition of alienation imposed upon all the successive heirs under said will in perpetuity, which prohibition of alienation, express or implied, is void under the Spanish law above quoted.

(*b*) Also, a clause in a will may be void as contrary to the established law, but this does not make the whole will invalid. The will, in its entirety, still remains valid, with the exception as to the void condition. We sustain that, though the clause of the will establishing a fideicomiso perpetuo is void, the will of Silva is a valid will, and so is the clause appointing Juan Apolinario Laboy as his sole and voluntary heir. In other words, Juan Apolinario Laboy acquired the legal title to the estate, subject only to the delivery of one-half of the net profits to the Santo Asilo de las Damas, but without the obligation not to alienate it and to transfer the estate to his substitutes *ad infinitum*. He received the estate by the will with the right to dispose by any act inter-vivos or mortis causa of the said legal title to the said estate, excepting always the beneficiary interest of the complainant to the one-half of the net profits, or, so to say, to the usufructus of the complainant, such usufructus

being a right attached to the land and therefore fully protected by the law.

The following provisions of the Civil Code, which are only declaratory of the law existing at the time of the enactment of said Code and since the law of perpetuities was enacted, will sustain our contention.

Section 792 of the Spanish Civil Code (Sec. 780 of the Civil Code of Porto Rico) provides as follows:

> "Impossible conditions and those contrary to law and good morals shall be considered as not imposed and shall not prejudice the heir or legatee in any manner whatsoever, even when the testator disposes otherwise."

Section 774 of the Civil Code of Porto Rico provides as follows:

> "The nullity of a substitution in trust shall not prejudice the validity of the designation nor of the heirs first designated; the *cestui que trust* clause shall simply be considered as not written."

Section 775 of the same says:

> "The provision by which the testator leaves a whole or a part of the inheritance to a person and the usufruct to another, shall be valid. If several persons are designated, not simultaneously, but successively, the provisions of Section 769 shall be observed."

Section 776:

> "A provision imposing upon an heir the obligation of perpetually investing specified sums in charitable works, as dowers for poor maidens, pensions for students or in favor of th poor, or for any charitable institution, or public institution, shall be valid upon the following conditions: if the charge is imposed on real property and is temporary, the heir or heirs may dispose of the encumbered estate, the lien not being removed until its record is cancelled. If the charge is perpetual, the heir may capitalize it and invest the capital, at interest, in a first and sufficient mortgage. The funding and the investment of the principal shall be made with the intervention of the Governor of Porto Rico and, after him, the Attorney General. In any case, if the testator should not have established an order for the administration and application of the legacy for charity, the proper administrative authority, according to law, shall do it."

The law is clear on this point, and we deem it unnecessary to cite any further authorities. Whenever a person is appointed as heir with an obligation not to alienate the estate, but to transfer it perpetually by substitution, as in the case at bar, such heir will take the estate with full power to dispose of the same. So the heir, Juan Apolinario Laboy, took possession of the estate of Silva with full power to dispose of the sa[illegible] in any manner whatsoever. Of course, always subject to the right of usufructus in favor of the Santo Asilo de las Damas.

It does therefore matter very little, or rather not at all, that the second heir, or the third, or the fourth, or the fifth, etc., did not comply with the provision to substitute other persons in their stead, because that provision was void originally, and Juan Apolinario Laboy took the estate without any such void and illegal obligation; once the estate vested in him in full, without any restrictions, except as to the usufructus of one-half of the net profits in favor of the complainant, his heirs could do what they pleased with it and were under no obligation to provide for substitutes or to make any will or testament at all. This estate could just as well pass to the legal heirs of Juan Apolinario Laboy and to the legal heirs of his heirs ab-intestate, without any will or testament but simply as legal heirs of the deceased.

As far as the usufructus in favor of the complainant, the Santo Asilo de las Damas, is concerned, it is not claimed by us, and never was claimed, that it is illegal. We maintain that the complainant is entitled to such usufructus and we always continued to comply with the condition establishing this usufructus, as, under the doctrine of the civil law of real rights, a real right, in so far as it follows the land, even if the land is transferred to third parties, is, so to say, a burden on the estate and is attached to it, and, as such burden, transmitted to any future owner of the estate.

POINT V.

That the cause of action is barred by the statute of limitations, notwithstanding the payment of one-half of the profits to the complainant by the defendant.

We maintain that even in case that the Santo Asilo de las Damas would have been vested with the title and right of possession of the estate of Silva since the death of Dominga Fernandez y Verdes, as claimed by the complainant, that still the defendant, Josefa Diana Martinez, by herself and by her predecessor in title, José Laboy, has been in adverse possession of the said estate for a lengthy period of time, sufficient to have acquired the right of ownership under the laws of Porto Rico by prescription.

Dominga Fernandez y Verdes died on the 15th day of January, 1891. (Page 3, Record, fol. 6.)

Upon her death José Laboy Fernandez took possession of the estate and continued to control and manage the same from the date of the death of the said Dominga Fernandez y Verdes up to the date of his death, on the 13th day of November, 1903. (Record, p. 4, fol. 7.)

Upon the death of the said José Laboy Fernandez, on the date aforesaid, the defendant, Josefa Diana Martinez, entered into possession of said estate and has continued in possession and control of the same up to the present time. (Record, p. 5, fol. 8.)

José Laboy Fernandez believed himself entitled to the estate of Silva as substituted heir, by virtue of the alternative appointment made by the first

heir, Juan Apolinario Laboy. He had, therefore, color of title and he had in his favor the presumption of good faith, if not rebutted by any evidence.

The defendant, Josefa Diana Martinez, had also color of title, as she was appointed by José Laboy as his substitute, and she has also in her favor the presumption of good faith.

Section 437 of the Civil Code of Porto Rico provides as follows:

> "Good faith is always presumed and any person averring bad faith on the part of the possessor is bound to prove the same."

Section 1841:

> "For ordinary prescription of ownership and other property rights it is necessary to possess things in good faith and under a proper title during the time specified by law."

Section 1851:

> "Good faith of the possessor consists in his belief that the person from whom he received the thing was the owner of the same and could convey his title."

Section 1853:

> "By a proper title is understood that which legally suffices to transfer the ownership of property rights, the prescription of which is in question."

Section 1858:

> "Ownership and other property rights in real property shall prescribe by possession for ten years as to persons present and for twenty years with regard to those absent, with good faith and with a proper title."

The sections quoted are from the Civil Code in force in Porto Rico at the present time.

Section 1840 of the same Code provides:

> "Prescription which began to run before the publication of this Code shall be governed by the prior laws; but if, after this Code became operative, the time required in the same for prescription has elapsed, it shall be effectual, even if, according to the said prior laws, a longer period of time may be required."

The Civil Code in existence in Porto Rico before the present Civil Code, in Article 1957, as amended by the Military Judicial Order of April 4th, 1899, reads as follows:

> "Ownership and other property rights in real property shall prescribe by possession for six years, as to persons present or absent, with good faith and with a proper title."

It will therefore be seen that the title to the said estate by simple operation of law has prescribed in favor of the defendant as against the complainant. The circumstance that the defendant has continued to deliver to the complainant one-half of the net profits to which the complainant was entitled by the will does not alter the case in any way, as the

defendant had still adverse possession of the property in every respect, claiming the estate as belonging to the defendant and to nobody else, subject only to the charge of the usufruct in favor of the complainant.

POINT VI.

That the complainant is estopped by its own action from setting up any claim to the ownership of the estate or against the validity of the leases.

The doctrine of estoppel finds a clear application to the case at bar.

Whatever may have been the nature of the transactions leading up to the leases by the defendant Josefa Diana Martinez to the other defendants, still both the original leases and the extensions of the same have always been acquiesced in and consented to by the complainant, who not only did not raise any objection at the time they were made, but had received and enjoyed the benefits derived from those leases.

Evidently this works as an estoppel preventing recovery.

In the case of Kirk vs. Hamilton, 102 U. S., 68, it was said:

> "If a man, knowingly, although he does it passively by looking on, suffers another to purchase and spend money on land under an erroneous opinion of title, without making known his own claim, he shall not afterwards be permitted to exercise his legal rights against such person."

"One who, by his renunciation or disclaimer of a right or title, has induced another to believe and act thereon, is estopped afterwards from asserting such right or title." (60 Cycl., 761.)

"An owner of proper y who stands by and sees a third person selling or mortgaging, under claim of title, without asserting his own title, or giving the purchaser or mortgagee any notice thereof, is estopped as against such purchaser or mortgagee from afterwards asserting his title." (16 Cycl., 762.)

"Where the true owner of property calls out another or allows him to appear as the owner of or as having control of disposition over the property, and innocent parties are thus led into dealing with such apparent owner or a person having such apparent power of disposition, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner which precludes him from disputing, as against them, the existence of title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance. The owner of real property may, by clothing another with an apparent title thereto, or with apparent authority over it, estop himself from denying such title or authority." (16 Cycl., 773.)

POINT VII.

Inadequacy of the price paid is not by itself sufficient proof of fraud in the transaction.

In the case at bar there is no proof either of direct or constructive fraud on behalf of the defendants, as the only basis or ground for sustaining a finding of fraud is taken from the inadequacy of consideration for the leases and their extensions. Even admitting that their rentals were inadequate, still we maintain that that fact alone, unaccompanied by any other element of fraud, can not be invoked as a ground to declare said leases void.

It has always been held that inadequacy of consideration by itself does not vitiate a transaction, unless combined with some other evidence of fraud, express or constructive.

> "Inadequacy of consideration is not, of itself, a distinct principle for relief in equity. The common law knows no such principle. The consideration, be it more or less, supports the contrary. Common sense knows no such principle. The value of a thing is what it will produce, and it admits of no precise standard. It must be, in its nature, fluctuating, and will depend upon ten thousand different circumstances. One man, in the disposal of his property, may sell it for less than another would. He may sell it under a pressure of circumstances which may induce him to part with it at a particular time. If courts of equity were to unravel all these transactions, they would throw everything into confusion and set afloat

the contracts of mankind. Such a consequence would, of itself, be sufficient to show the inconvenience and impracticability, if not the injustice, of adopting the doctrine that mere inadequacy of consideration should form a distinct ground for relief."

Story, Vol. 1, Section 245.
See 10 L. R. A., 606 (Note) on Proof of Fraud.

Conclusion.

It is respectfully submitted that the Court below should be ordered to set aside the decree entered in this case and enter a decree for the appellants, or defendants in the bill of complaint.

Respectfully submitted,

CHARLES M. BOERMAN,
Of Counsel for Appellants.

ADDITION, APPELLANT'S BRIEF.

(To be inserted at page 27.)

The ancient Spanish law on the subject in force at the time at the making of the will in the case at bar is contained in Partida 6, Title 4, Law 3 of the Siete Partidas, and reads, translated, as follows:

"Among the conditions by which men institute heirs for the future there may be such which are impossible because impeded by nature. For example, if the testator say to one: I make you my heir if you reach heaven by your hand. Such a condition will not impede the institution of heirship, as the condition is impossible and we said before that it will stand as not written. The same occurs with all mandates made by the testator with such or analogous conditions. We also say that conditions which are impossible under the law, when put in institutions of heirship or other mandates, do not impede the heirs, although not to be complied with. For example, if the testator say to one: I make you my heir if you will not free your father from captivity or if you will not give him to eat. Such a condition is not valid, so that although not complied with the heir take his inheritance or any other bequest left; and generally are considered impossible under the law all those conditions which are contrary to honesty or good morals or works of piety or natural rights." Article 786 of the Spanish Civil Code of 1889 says as follows: "The nullity of a fideicommissary substitution shall not prejudice the validity of the institution of heirship or the heirs first instituted; the fideicommissary clause will be considered as not written." The Civil Codes of Italy (900), of Portugal (1869) and Mexico (3632) contain the same provisions.

We are aware that the French Civil Code pro-

vides differently in its article 896. But we respectfully submit that in the case at bar, as the will has been made by a Spaniard in a Spanish country, we must go by the Spanish Law and not by any other.

In all other respects as far as fideicommissary substitutions are concerned the French Law is identical with the Spanish Law on the subject. See Code Napoleon, Article 896. Troplong in Droit Civil explique, Donations et testament, Vol. 1, article 90, says that under the French Law fideicommissary substitutions are prohibited. In article 117 he says that even if the prohibition to alienate is not expressed, it is nevertheless a substitution and null under the laws in article 136. Troplong cites: Arret de la cour de Paris of 11 May, 1852, on this subject.

UNDER THE SPANISH LAW THE REMAINDER OF AN ESTATE, IF ANY, GOES IN CASE OF THE ILLEGALITY OF A PERPETUITY TO THE INSTITUTED HEIR AND TO NO ONE ELSE.

In support of this contention we will first cite Escriche: "Diccionario razonado de legislación y jurisprudeñcia" under the word "heredero universal." It says, translated, as follows: "By the decision of the Supreme Court of Justice of the 27th of September, 1845, it was declared that the universal heir has a right with preference against the legitimate heir to the bequests which cannot have effect for some legal impediment, in conformity with the legislation of the 'Partidas,' although we do not mean that the 8th law, title 18, book 10 of the Nóvisima Recopilación is abrogated, which recognized the validity of the bequest in wills in default of the institution of heirship and

which declared that it should go to the heir abintestato, because that law had only as its object to abrogate the disposition of the 'Partidas' which annuls a testament in which there was no institution of heirship in order that the bequest might take effect, but not the disposition which prefers the testamentary heir to the legitimate one in the distribution of those bequests. By the same sentence it has been decided that in case for any legal reason a foundation of the perpetuity be annulled, the same go to the mass of the heirship, also without meaning that the said doctrine were abrogated by law 12, title 17, book 10 of the 'Nóvisima' which declared null and void the vinculaciones or perpetuities, betterments and prohibitions of alienation which may be made in future, and gives the right to the immediate relatives of the testator to reclaim them. This last clause of the law does not mean to say that a bequest by which any perpetuity was unlawfully made and which was therefore annulled, goes to the next relative with preference to the universal heir, but only that the immediate relatives of the testator inherit said bequest in a certain case, that is to say, where there is no universal heir and in preference to the person who was named as a beneficiary of the void perpetuity."

Here are the contents of the said decision resolving about said questions:

In the proceedings of Don Victoriano against Don Gonzalo and Doña Rosalía about reclamation of a house which the defunct Doña Alfonsa left which are now before us by a cassation proposed by Don Gonzalo and Doña Rosalía against the sentence of review pronounced by the Audiencia of this Court of the 6th of May, 1844, by which it was declared that the said house belonged to Don Victoriano without prejudice of any other relative, who may prove greater relationship with Doña Alfonza,

the cause having been heard; considering that law 12, title 17, book 10 of the Nóvisima Recopilación had as its sole object to put an end to any indefinite amortization or perpetuity for which purpose it provided that for its validity there must be a Special Royal Permission at the petition of the interested parties; considering that the words of the said law "with the right to the immediate relatives to first inherit in the ammortized perpetuity without those requisites," cannot be understood except meaning in its case and also, because it was not intended to make new legislation in reference to successions or to abrogate incidentally the one which was in force before; considering that in conformity with this when there is an institution of universal heirship the bequests which were annulled remain in the benefit of the heirship, considering that this is the doctrine stated in the clear laws of the "Partidas"; which were not abrogated by the first law, title 18, book 10, of the Nóvisima Recopliación; considering finally that this doctrine and that laws upon which it is founded were misunderstood by the foresaid sentence of review: We adjudge that the said procedure of the cassation is right and we declare the said sentence without any value or legal effect, and we order that the proceedings go back to the Audiencia for the effects expressed in article 18 in the decree of the 4th of November, 1838, cancelling thereby the obligation made for the cited Don Gonzalo and Doña Rosalía. Decision of the 27th of September, 1845.

So far from Escriche. In the case at bar there was an institution of a universal heirship, as Juan Laboy has been named as the only and voluntary heir, with an obligation of the perpetuity which is void under the law then in existence. Therefore all the property including the remainder must go to him and his successors.

In the decision of the Supreme Court of Spain in the case of Costilla against Llano in Jurisprudencia Civil, Volume 67, page 675, the Court has declared that even if the word heir was not used but only the word "testamentario," or "heredero fideicomisario" that is equivalent to a confidential heirship.

The Court says among other things, as follows: "And Law 8th, title 33, Partida 7th, is well followed by a decision which considers a fideicomiso as universal if the testator mentioned the fidecomisarios as heirs and the fidecomiso for certain foundations was to be a burden upon the whole inheritance without other bequests for deductions than masses and various others.

Now, we want to make clear the difference between what is called in the Spanish law "Sustitución fidecomisaria" and what is called "Sustitución vulgar," or in English, between a trust substitution and a common substitution. The substitution which was made in the will in the case at bar in the provision that Juan Laboy, the first heir, substitute another one in his place, and so *ab infinitum* is a sustitucion fidecomisaria because it has for its object to secure the usufruct of half the income for the benefit of the said Asilo de las señoras Damas de Ponce. But the clause of the will which provides that in certain cases the property shall go to the said Asilo de Damas in case of non-fulfilment of the conditions and so forth, is a simple common substitution or in Spanish, "substitución vulgar," because this is not a trust, but a simple provision that in case the first heir does not comply or for certain other causes another heir shall be substituted. There is no trust instituted or communicated by this provision.

Having made this clear, we will cite the Supreme

Court of Spain for our contention that all the property including the remainder, if any, goes in the case at bar to the first heir and his successors.

In the case of Casaux against Rivero, decided 24th January, 1891, and reported in Jurisprudencia Civil, Volume 69, page 104, the Supreme Court of Spain says as follows: "That the Sustitución vulgar does not take place and is extinguished once the first instituted heir accepted the inheritance, because in that case the motive which gave cause to it fails; which as expressly provided by law 4, title 5, Partida 6 is a necessary condition of the institution. It is defined and regulated by the laws 102 of the same title and partida; which doctrine is applicable to the substitution of this trust with exception if the testator expressly provided to the contrary." In the case of Coromina against Bosch, decided on the 27th of April, 1898, and reported in Jurisprudencia Civil, Volume 84, page 145, the Supreme Court of Spain decides as follows: "That in case a testament provides for a substitution on the condition that the heir dies before coming of age or after 14 years without having made a testament or leaving no issue or such, which will not arrive to the said age, it is clear in case the next heir made a testament, no matter if he had issue or not, the instituted substitution disappears and the inheritance remains to the free disposition of the said heir, whose will expressed in a testament must be respected." The same has been decided in the case of Caparío against Caparío, decided the 7th of March, 1905, and reported in Jurisprudencia Civil, Volume 100, page 487.

It is therefore clear from whatever point of view we may consider the case at bar, that once the imposed conditions are illegal and therefore void and the first instituted heir or his substitute has taken

possession of the heirship and of the inheritance that the full title vested in them for ever against all parties, even against the legitimate heirs of the testator and that no reversion or remainder attached to their inheritance any more.

CHARLES M. BOERMAN,
Of Counsel.

Supreme Court, U. S.
FILED.
JAN 18 1909
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 83.

JOSEFA DIANA MARTINEZ, JULIO N. CHARDON, CARLOS CABRERA AND TOMAS TORRES,

Appellants,

vs.

LA ASOCIACION DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE.

ADDITIONAL BRIEF FOR APPELLANT ON QUESTION OF JURISDICTION.

FRITZ v. BRIESEN,
Of Counsel for Appellants.

[illegible]

The Evening Post Job Printing Office, 156 Fulton St., N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1908.

JOSEFA DIANA MARTINEZ *et al.*, Appellants, vs. LA ASOCIACION DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE, Appellee.	No. 83. (No. 312, October term, 1907.)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PORTO RICO.

ADDITIONAL BRIEF ON BEHALF OF APPELLANTS.

This additional brief is intended to cover only one point, and to present additional authorities and view points to those contained in the main brief filed in this case.

The United States District Court for the District of Porto Rico was without jurisdiction to try this case.

By the Act establishing the government of Porto Rico (Foraker Act, 31 Stat. at L. Chap. 191, Sec.,

34, April 12, 1900) it was provided that "Porto Rico shall constitute a judicial district to be called the district of Porto Rico, * * * the District Court for said District shall be called the District Court of the United States for Porto Rico * * * and shall have in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizant in the Circuit Court of the United States, and shall proceed therein in the same manner as a Circuit Court."

By the Act of March 2, 1901 (31 Stat. at L., Chap. 812, Sec. 3), the foregoing act was amended,—it being provided that "the jurisdiction of the District Court of the United States for Porto Rico in civil cases shall, in addition to that conferred by the Act of April 12, 1900, extend to and embrace controversies where the parties or either of them are citizens of the United States or citizens or subjects of a foreign State or States wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of $1,000".

The bill alleges that all the defendants below are citizens of Porto Rico (Rec., page 1, fol. 2).

In order therefore to give jurisdiction to the Court below, it was necessary that the complainant be either a citizen of the United States, or a citizen or subject of a foreign State. There is no question but that it was not an American citizen: 23 Op. Atty. Gen. 370, Gonzalez *v.* Williams, 192 U. S. 1; certainly not within the meaning of the above quoted amendment.

The question therefore is whether or not the complainant is a citizen or subject of a foreign country. It was alleged in the bill (Rec., p. 1, Fol. 2) that it is "a charitable corporation organized and existing under the laws of the Kingdom of Spain," and the Court below so found in the following words (Rec. p. 29):

"The complainant is apparently a secular charitable corporation or assocattion organized by a royal decree of the Spanish Crown on November 11, 1863, (2 Leg. Ult. Marina, Rodriguez San Pedro, p. 201)

having its headquarters at Ponce in the Island of Porto Rico, and as appears by letters and certificates from the insular authorities duly authorized to continue business in the Island at and since the time of the filing of the suit."

The defendants by demurrer raised the question as to the citizenship of the complainant (Rec. p. 18).

This demurrer having been overruled, (Rec. p. 19), the same objection was taken by defendants in their answer, (Rec. p. 27, Fol. 50):

"And these defendants further answering allege that complainant is a corporation organized and existing under the laws of Porto Rico, and all the defendants are citizens of Porto Rico."

The Court below held (Rec. p. 29) that the complainant is a citizen of the Kingdom of Spain and cites in support of this decision the alleged charter granted by the King of Spain, in 1863. This alleged charter is a matter of public record (2 Leg. Ult. Marina, p. 201). For the convenience of the Court a translation thereof has been added to this Brief as "Appendix A."

It appears from this alleged charter that the Crown of Spain in 1863 authorized the establishment of the complainant association for the purpose of establishing asylums and schools for poor children for the poor of the district, (Ponce, Porto Rico). By-laws, Art. I. The By-laws (Reglamento) form a part of the alleged charter and received the approval of the crown. Art. 37 of the Civil Code of 1889 provides that the civil capacity of associations is regulated by their by-laws.

Art. III provides that the Society accepts as protector his Excellency, the Governor Captain General of the Island (of Porto Rico). A perusal of the By-Laws will show that the association was established by the Crown *by virtue of the Crown's prerogatives*

and rights within said Island of Porto Rico for the purpose of establishing a local charity within the District of Ponce on the Island. The alleged charter shows that it was granted at the request of ladies of Ponce and contains a statement to the effect that her Majesty the Queen views with approbation the charitable sentiments of the people of Ponce.

It does not appear from the alleged charter that the association is to have headquarters within the Kingdom of Spain proper, or at any other place than at Ponce, and the fact that the alleged charter is published in the collection of charters called "Ultra Marine Legislation" proves conclusively that the Society was to have no more than a local scope.

The following question is placed before this Court:

"*Is a merely local association established within the Island of Porto Rico by the Spanish Crown, by virtue of its sovereignty over such Island, at the present time a Spanish citizen or a citizen of Porto Rico?*"

It is the generally accepted rule that, under the judiciary acts of the United States, the citizenship of a corporation is presumed to be that of the State creating it. It will here be shown that in a case like the present, this rule should not be applied. So far as counsel know this question has never been directly decided, although as will hereafter be shown, it has practically been decided in favor of the present contention in the case of *Dartmouth College* vs. *Woodward, 4 Wheaton, 518.*

The history of the construction of the word "citizen" in the judiciary acts is a very interesting one. A brief review of it is given in the opinion of Mr. Justice Shiras in *St. Louis & San Francisco Ry.* vs. *James, 161 U. S., 545, 554, et seq.;* also in Barrow S. S. Co. *v.* Kane, 170 U. S. 100.

It was at first held that corporations were not citizens:

"That invisible, intangible and artificial being, that mere legal entity, a corporation aggregate is certainly not a citizen; and consequently cannot sue or be sued in the Courts of the United States unless the rights of the members in this respect can be exercised in their corporate name." Chief Justice Marshall in *Bank of the United States* vs. *Deveaux*, *5 Cranch, 61, 86.* It was held, however, in this case that "the Court feels itself authorized * * * to look to the character of the individuals who compose the corporation," (pp. 91 to 92,) and finally decided that the capacity of a corporation to sue in the United States Courts depends upon the citizenship of its members. This rule was approved in *Bank* vs. *Earle*, *13 Peters, 519.*

However, evidently realizing the inconvenience and practical injustice of this doctrine, the Court in *Louisville, etc., R. R.* vs. *Letson*, *2 How., 497*, laid down the rule "that a corporation created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State for the purpose of its incorporation, capable of being treated as a citizen of that State." (Page 558.) This rule has been consistently adhered to. (See Andrews' American Law, Vol. 1, Sec. 439, Note 81.) See, for instance, *Marshall* vs. *B. & O. R. R. Co.*, *16 How., 314*, and *Railroad Co.* vs. *Koontz*, *104 U. S., 5.*

It will be seen that the doctrine that, under the judiciary acts, a corporation must be presumed to be a citizen of the State which created it, was based primarily upon the idea, first enunciated over one hundred years ago, that a corporation enjoyed the citizenship of its individual members. As corporations multiplied, and it became more common for citizens of different States to

unite in forming corporations or to become stockholders in corporations, it was made a presumption of law that a corporation was a citizen of the State by which it was created and in which it did business. Mr. Justice Shiras in the case above referred to, 161 U. S., 545, says (page 563) that the Court is unwilling to sanction "an extension of a doctrine which, as heretofore established, *went to the very verge of judicial power.* That doctrine *began*, as we have seen, *in the assumption that State corporations were composed of citizens of the State which created them;* but such assumption was one of fact and was the subject of allegation and traverse, and thus the jurisdiction of the Federal Courts might be defeated. Then, after a long contest in this Court, it was settled that the presumption of citizenship is one of law not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

There is no reason, either in law or necessity, why this doctrine should be applied to a corporation, the members of which, as will be shown, must be presumed to be, not citizens or subjects of a foreign country, but citizens of Porto Rico. "Reason is the soul of the law; the reason of the law being changed the law is also changed." (7 Coke, 7; Bouvier's Law Dict., Tit. "Maxims.")

The plaintiff association, as has already been shown, was created upon the petition of ladies of Ponce, Porto Rico, for strictly local charitable purposes. If it was at the time, and up to 1898, a Spanish corporation, then under the reasoning of the cases above cited, it must be presumed that all of its members were Porto Ricans or, in the broadest interpretation, Spanish subjects. Under the Treaty of Peace between the United States and Spain, signed in 1898 (Art. IX), it was provided that the civil rights and political status of the native in-

habitants of the territories shall be determined by the Congress, although Spanish subjects, natives of the Peninsula, were permitted to retain their Spanish citizenship upon making a formal declaration of their decision to this effect, in default of which declaration they shall have been held to have resigned it and to have adopted the nationality of the territory in which they reside (see Gonzales *vs.* Williams, 192, U. S., 1, 9). Thereupon Congress passed an act, April 12, 1900, creating a civil government for Porto Rico, and provided in Section 7 "that all inhabitants continuing to reside therein who were Spanish subjects on the 11th day of April, 1899, and then resided in Porto Rico shall be deemed and held citizens of Porto Rico * * * except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the 11th day of April, 1900."

It must, therefore, be presumed that, unless the members of the association were Spaniards of the peninsula and filed the declaration that they are now citizens of Porto Rico, and by consequence that the association, if it be a corporation, must, under the judiciary acts, be held to be, by analogy to the reasoning of the above cited cases, a corporation of Porto Rico. There is nothing in the record to show that the individual members made the declarations contemplated by the treaty or the statute.

We shall now consider the question from another aspect:

The plaintiff association, as has already been shown, was authorized by the Crown of Spain by virtue of the sovereignty residing in said Crown over the island of Porto Rico. It appears from the charter (Appendix A) that the association was not authorized to have any home, habitat, place of business or asylum in any place outside of the island of Porto Rico. See Art. 28, of the Civil Code of 1889, which provides that, while corporations "domiciled in Spain shall enjoy the Spanish nationality," "*asso-*

ciations domiciled abroad shall have in Spain the consideration and the rights fixed in treaties or *special laws*"; and Art. 41, which provides that "when neither the law which has created or recognized them, nor the statutes or rules of their establishment fix the domicile of judicial persons, it shall be understood that it is at the place where their legal representation is established or where they exercise the principal duties of their institution."

This sovereignty now no longer resides in the Crown of Spain, but resides in a body politic created by Section 7 of the Act of April 12, 1900 (31 Stat. at L., 77, Chap. 191), known under the name of The People of Porto Rico. Of course the ultimate sovereignty resides in the United States of America, but such sovereignty, in so far as the immediate status and the status under the judiciary acts in concerned, has been conferred upon this body politic by the aforementioned acts. (See particularly Secs. 8 and 15.)

The People of Porto Rico have therefore entirely supplanted the sovereignty of the Crown of Spain or, as the phrase is, for the purpose of the present inquiry they have "stepped into the shoes of the King of Spain." The authority under which the association does business is therefore now in the hands of The People of Porto Rico. If the association exists at all, it exists only by virtue of the express or implied authority granted to the same by the people of Porto Rico.

It is therefore a citizen of Porto Rico. It owes allegiance to the present government, and may claim protection from it (Cyc. of Law & Proc., Vol. 7, pp. 133, 136, 142, and authorities there cited).

The situation is substantially identical with that which arose under the charter of Dartmouth College and our treaty with England of 1783. Dartmouth College was organized in 1769 under a charter granted by the then King of England, George III, the charter being witnessed by the then Governor of the Province of New Hampshire. The corpora-

tion thus formed did business until 1816 when the State of New Hampshire attempted to amend its charter. This attempt led to the famous litigation which was finally determined by this Court in *Dartmouth College* vs. *Woodward, 4 Wheat. 518.* In its decision, this Court held, page 643, " This is plainly a contract to which the donors, trustees and the Crown (*to whose rights and obligations New Hampshire succeeds*), were the original parties."

The parallel is all the more striking in that at the time of the declaration of the inhabitants, New Hampshire was governed by a Governor and a local legislature of two houses, and at the time of the Treaty of Peace with Spain in 1898, the Island of Porto Rico was governed by a Governor and legislature of two houses, under the Constitution promulgated by royal decree of November, 1897 (an English translation of which has been printed by the Government Printing Office, Washington, 1899). It seems that if the Court below were correct in holding the plaintiff to be a Spanish corporation, then Dartmouth College in 1819, and probably today, would be a British corporation. If the decision below were affirmed, it would seem that it would affect the citizenship of many corporations formed under charters granted by the British Crown prior to 1776. It has been abundantly held that a corporation "can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law and by force of law, and *where that law ceases to operate the corporation can have no existence.* It must dwell in the place of its creation." *Ohio & Mississippi R. Co.* vs. *Wheeler, 1 Black, 286, 295,* citing *Bank of Augusta* vs. *Earle, 13 Peters, 512.* See also *Paul* vs. *Virginia, 8 Wallace, 168, 181.*

It must follow that where the sovereignty that gave it birth passes to or under another sovereignty, the corporations created by the former must become,

in contemplation of law, a citizen or subject of the latter. The authorization in question was addressed to the Governor Captain General of Porto Rico, and was therefore granted under so much of the sovereignty held by tho Crown of Spain as related to the Island of Porto Rico. If the Crown of Spain had had no sovereignty over the Island of Porto Rico, the charter would have been a complete nullity. No State can legally create a corporation for the purpose of having its headquarters and doing its business entirely outside of its jurisdiction. Therefore, if this sovereignty has now been lost, the association can no longer look to it for protection or for a legal fountain of existence, but must look to the new sovereignty, to wit, the United States of America, as represented by the body politic known as The People of Porto Rico.

The case is analogous to that of a territorial corporation when the territory becomes a State. In such case the corporation becomes a citizen of the State.

Kansas Pacific R. R. vs. *Atchison, 112 U. S. 415.*

Attention is further called to the fact that the earlier decisions under which the present doctrine of citizenship was developed, referred to the fact that the corporations in question were not only created by "but did business" or "had a home" in the State of its incorporation.

Louisville, etc., R. R. v. *Letson, 2 How. 497.*

The plaintiff has no home at the present time in the Kingdom of Spain, and does not do business in the Kingdom of Spain.

It is respectfully submitted that although the association was created originally by the Crown of Spain, the defendants below were correct in urging

both by demurrer and by answer that the association does not now "exist" as a Spanish citizen, but is a citizen of Porto Rico, and that, therefore, the Court below had no jurisdiction to hear the case. The case, with all its intricate questions involving a close knowledge of the Spanish law, should have been heard by the Supreme Court of Porto Rico.

The discussion hitherto has been based upon the assumption that the Court below was correct in holding that the plaintiff is a corporation. Now, as a matter of fact, it was not a corporation, but an *association*. Its title and by-laws show this. The Court below held it to be "*apparently* a secular, charitable corporation *or association*" (Rec., p. 29, fol. 54). The Civil Code of 1889 draws a distinction between corporations and associations (see Art. 35), and states, in Art. 37, that "the civil capacity of corporations shall be governed by the laws which have created or recognized them; *that of associations by their by-laws.*"

It will appear from a perusal of the by-laws (Appendix A) that the plaintiff association is

> * * * "a body of persons acting together; without a charter, but upon the methods and forms used by incorporated bodies, for the prosecution of some common enterprise."
>
> Cyc. of Law & Proc. Vol. 4, p. 301, Art. "Associations."

The association was regulated, according to the Civil Code, by its by-laws, just as is an association under the laws of the various states of the Union. An association, being only a collection of individuals, could not, in common law, sue by its own name, and an action brought by such an association is necessarily brought in the names of all the indi-

vidual members, except where the common law rule has been modified.

The Civil Code of 1889, Art. 35, *et seq.*, appears to give to the association a judicial personality, so that it may hold property in its own name and bring suit in its own name. However, there appears to be nothing in the Code, or in any of the laws applicable to the situation, which brings such an association within the line of decisions which hold that a corporation may be deemed a citizen of the State creating it.

An association is, broadly speaking, rather analogous to a partnership than to a corporation.

For authorities on these points see the very short chapter on Associations in Cyc. of Law & Proc., Vol. 4, p. 301, *et seq.*

It would, therefore, seem reasonable to conclude that if the plaintiff association may sue as a judicial person its citizenship must be determined by that of its members. Unless the contrary is shown it must be presumed that the association is composed of Porto Rican citizens. As nothing to the contrary has been shown, and the burden of proof lay with the plaintiff to prove its foreign citizenship in order to invoke the jurisdiction of the United States Court, it must follow that the Court below had no jurisdiction in the present case.

New York, January 15, 1909.

Respectfully submitted,

FRITZ v. BRIESEN,
Of Counsel for Appellants.

APPENDIX A.

1863. NOVEMBER 11, 1863.

Royal order authorizing the establishment of an asylum of charity in Ponce and approving the By-laws.

EXCELLENT SIR:

This department has received a letter, #367, of the 10th of September ult., in which Your Excellency gives an account, with copies of documents, relative to the establishment of an asylum of charity in Ponce, at the request of Donna Henrriqueta Vinsch de Prats and various ladies of that city. His majesty, in view of the favorable reports received about this matter, has decided to grant the authorization requested, and to approve the by-laws which accompany the same. At the same time the Queen has requested that Your Excellency be informed that she viewed with pleasure this proof of the charitable sentiments of the people of Ponce—By Royal Order, etc.—Madrid, November 11, 1863—To the Governor Captain General of the Island of Porto Rico.

BY-LAWS REFERRED TO.

CONCERNING THE ASSOCIATION IN GENERAL.

ARTICLE 1. This association recognizes as its principal object the alleviation of human suffering, and for this purpose it will establish an asylum for the poor of the district. When its resources permit it to give its attention to other objects related to its purpose it will establish schools for poor children of both sexes under the supervision of Sisters of Charity.

ARTICLE 2. The society will be under the patronage of Our Lady of Carmen.

ARTICLE 3. The society accepts as protector His Excellency, the Governor Captain General of the Island.

ARTICLE 4. The society will be governed by a Board of Directors which will administer its funds and which will look after its development and progress. This board shall consist of a lady president, a lady vice-president, and six directors, a lady treasurer and a lady secretary.

ARTICLE 5. There shall be in addition four gentlemen directors to assist in the labors of the treasurer and secretary and shall take care of such duties of the asylum which are not compatible with the delicacy of the fair sex.

ARTICLE 6. The Board of Directors shall be elected by the body of charter members, and the renewal of their offices shall be made by a plurality of votes of the Board (?) when a vacancy occurs, but only members of the Ladies of Santo Asilo are eligible.

ARTICLE 7. Members of the Ladies of Santo Asilo shall be all such as desire to become members, and enter their names in the register of the association, fixing monthly alms which they voluntarily desire to contribute to its maintainance, and obligating themselves to lend their personal services when the Board deems it advisable to make use of the same.

ARTICLE 8. The internal duties of the asylum will be confided to Sisters of Charity, when such are available, and their regimen shall be the object of a special set of rules.

ARTICLE 9. Every six months there will be published in a local newspaper a report of the society's finances for the information of the contributing friends.

ARTICLE 10. The Board of Directors shall hold two regular meetings a month, without prejudice to the extraordinary meetings which may be assembled upon the call of the lady president.

ARTICLE 11. A quorum of the board shall consist of one-half plus one of its members: Its resolutions shall be taken by an absolute majority and the president shall have a decisive vote in case of a tie.

ARTICLE 12. In the month of January of each year there shall be a general meeting to which all the subscribing ladies shall be invited and at such meeting an account shall be given of the condition and progress of the institution by means of a written report presented by the Board of Directors.

ARTICLE 13. The office of any lady member of the Board of Directors shall be considered vacant if in the opinion of her associates she has, without any justification, failed to attend the meetings or to attend to the duties imposed upon her by Board of Directors.

THE BOARD OF DIRECTORS.

ARTICLE 14. The Board of Directors shall have the following functions :

1. To fix the number of beds which are to be sustained, as the funds of the asylum will permit, and to grant admission to the asylum to such of the poor who are to occupy them, and who make request for admission either for themselves or for another person. In the latter case, resolutions made by three ladies of the board shall be valid as long as they do not exceed the number of beds fixed by the board.

2. To make contracts which are made necessary by the needs of the institution.

3. To fix the house-rules for the interior conduct of the asylum and to appoint employes and servants which the same calls for, watching over the strict compliance therewith by means of committees appointed from among its own members.

4. To fix the day on which the general meetings are to be held.

The President.

Article 15. The lady president shall have the following functions:

1. Conduct correspondence with the authorities and with individuals; to attest jointly with the lady secretary the resolutions of the Board of Directors, and to see to it that these are complied with as speedily as possible.

2. To preside over all the acts of the association and to issue the necessary call, through the lady secretary, for all ordinary and extraordinary meetings.

3. To attest the monthly receipts for alms and other contributions which the lady treasurer may issue, as also the orders for payment which may be issued by the ladies appointed for this purpose.

4. To issue orders for admission of the sick to the asylum.

5. To decide herself extraordinary and urgent cases, submitting her decisions immediately for the approbation of the Board.

6. To hold one of the two keys which lock the safe containing the funds of the association.

7. To watch over the order and good administration necessary for the progress of the asylum.

The Vice-President.

Article 16. She shall exercise all powers of the president in case of her absence, illness or other legal impediment, until she returns to her post or until a regular president is elected, taking her turn in the meantime with the lady directors in the discharge of the obligations which the house rules assign to her, and also discharging the duties committed to her by the president or the Board.

The Directors.

Article 17. The six lady directors, in the order of their election, substitute for the president and vice-president in the cases provided for in the last article, or in case these ladies cannot take part in the decisions and acts of the association. They shall discharge as quickly as possible the duties entrusted to them by the Board of Directors and the president, or which are laid upon them by the house rules of the asylum, issuing orders for payment which are made necessary by their business, which shall become effective upon approval by the president.

Article 18. The four gentleman directors shall have voice and vote in the meetings and shall be auxiliaries in their respective duties: one to the president, one to the treasurer, one to the secretary, and the last shall be the attorney of the association which he may represent in or out of court in asserting or in defending its rights, first receiving competent power which the Board of Directors will give him when necessary.

These gentleman directors shall also discharge the duties entrusted to them by the board or by the president, and in addition to complying with the by-laws, so far as they concern them, shall take under their special care and charge the policing and keeping order in the room for the male patients, and all such functions of the asylum which are incompatible with the delicacy of the fair sex.

The Treasurer.

Article 19. The treasurer shall have the following duties:

1. To issue the bills for monthly alms and other contributions, and, with the approval of the presi-

dent, collect them by means of the bill collector of the house.

2. To guard in her house the safe which contains the funds of the establishment, and to keep in her possession one of the two keys which lock the same.

3. To render accounts of the expenses and receipts of the funds of the association.

4. To make a statement, on the last day of each month, of the cash and securities and transmit such statement to the president.

5. To pay the vouchers which each lady issues in carrying out her duties, and which have the approval of the president, as well as the warrants which she will draw, authorized by the secretary, by virtue of the business entrusted to her by the Board.

6. To comply with the obligations assigned to her by the house rules, and to attend to such duties as the Board or president may lay upon her and are not incompatible with the duties aforementioned.

7. To help the secretary in drawing up the annual report, referred to in Article 12, furnishing her with such data as are within her power.

The Secretary.

Article 20. In addition to the obligations imposed upon the lady directors the following shall be exclusively hers:

1. To keep a general register of the members of the Damas del Santo Asilo and another of such other charitable persons, who, without being such members, contribute monthly with their alms to the pious purposes of the institution.

2. To keep a minute book which she shall sign with the president.

3. To authorize with her the warrants for paying

what the president has spent in the discharge of the duties laid upon her.

4. To send out and sign the summons for ordinary meetings, and for such extraordinary meetings as the president may deem advisable, as well as to attend to the official correspondence with the authorities and private persons, which however the president is to sign.

5. To prepare the annual report referred to in Article 12, using for this purpose the data furnished by the treasurer.

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IN THE

DISTRICT COURT OF THE UNITED STATES

FOR PORTO RICO.

I, JOHN L. GAY, Clerk of the aforesaid Court, do hereby certify that the foregoing six pages are truly copied from Vol. 2, pages 201 to 203 of a book titled "Legislacion Ultramarina" concordada y anotada por D. Joaquin Rodriguez. San Pedro.—Madrid, 1865.

Witness, my official signature and the seal of said Court at Ponce, P. R., this 1st day of December, 1908.

JOHN L. GAY.